86-300

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

JIMMY E. FROST, JR.
AIRMAN, UNITED STATES AIR FORCE,
PETITIONER

v.

THE UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether the Due Process Clause of the Fifth Amendment of the Constitution of the United States requires military authorities to preserve urine samples of military members suspected of drug abuse in order for the results of urinalysis tests performed thereon to be admissible in criminal prosecutions when the defense requested, prior to the destruction of the urine sample, that it be retained for the purpose of conducting an independent defense test of the urine?

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

JIMMY E. FROST, JR.
AIRMAN, UNITED STATES AIR FORCE,
PETITIONER,

v.

THE UNITED STATES OF AMERICA,
RESPONDENT,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Airman Jimmy E. Frost, Jr., United States Air Force, respectfully petitions for a writ of certiorari to review the judgment and summary disposition of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The decision of the United States Air Force Court of Military Review is published at 19 M.J. 509 (A.F.C.M.R. 1984) (Appendix B). The summary disposition of the United States Court of Military Appeals is reported at 22 M.J. ___ (C.M.A. 1986) (Appendix A).

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on 17 July 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the Constitution of the United States provides: "No person shall be . . . deprived of life, liberty, or property without due process of law."

STATUTORY PROVISION INVOLVED

Article 46 of the Uniform Code of Military Justice (10 U.S.C. 846) provides: "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."

STATEMENT OF THE CASE

On 15 March 1984, the petitioner was tried by special court-martial at Holloman Air Force Base, New Mexico, convened by order of the Commander, 833rd Combat Support Group (Tactical Air Command). Contrary to his plea, he was convicted of one specification of wrongful use of marijuana in violation of Article 134 of the Uniform Code of Military Justice (U.C.M.J.) (10 U.S.C. 934). The court-martial sentenced the petitioner to be discharged from the United States Air Force with a bad conduct discharge, to be confined at hard labor for one month, to forfeit $200.00 pay per month for one month and to be reduced to airman basic. On 8 May 1984, the convening authority approved the findings of guilty and the sentence as adjudged. On 12 September 1984, the United States Air Force Court of Military Review affirmed the findings of guilty and the sentence as approved by the convening authority. Upon discretionary review pursuant to Article 67(b)(3), U.C.M.J., (10 U.S.C. 867(b)(3)), the United States Court of Military Appeals, on 17 July 1986, affirmed the decision of the United States Air Force Court of Military Review.

The petitioner was convicted solely on the basis of a urinalysis test. The urine was obtained as part of a unit sweep of the transition flight to which the petitioner was assigned (R. 11). Upon being informed that the result of the test was positive for marijuana, the military defense counsel made a discovery request for, *inter alia*, information as to the chain of custody, the identity of the person performing the test, information as to whether the urine specimens still existed and access to the specimen for purposes of retesting by the defense. Appellate Exhibits XVIII and XIX. These discovery

requests were dated 26 September and 27 September 1983 and included a request for the same information in the case of *United States v. Krueger*, 22 M.J. 210 (C.M.A. 1986), which case is also before this Honorable Court on a petition for a writ of certiorari (docket number 85-2096 filed 20 June 1986).

At trial the petitioner was represented by military defense counsel and civilian defense counsel (R. 4). The military judge noted that the case of *United States v. Krueger, supra*, had been tried the previous day, the defense counsel were the same and the defense motions appeared to be the same (R. 6). The defense did not challenge the military judge for cause (R. 6).

Defense counsel moved to dismiss the case because of a failure to preserve a sample of the petitioner's urine for independent defense analysis (R. 37). Appellate Exhibit XII. The military judge denied the motion and made the following findings:

> The following findings of fact are made. Number one, an independent retest was requested by the Defense Counsel on 26 September 1983. This was a timely request. Number two, the request was made known to the Brooks – excuse me – a request was made to the Brooks Laboratory to preserve the urine. The Brooks Laboratory was aware of the request and had a duty to preserve the sample. Number three, an aliquot was delivered to LTC Collins in Toxicology on 27 September 1983. Number four, the parent urine sample was inadvertently destroyed at sometime between 27 September and 28 November 1983 by a person unknown. Number five, the aliquot that previously had been given to LTC Collins in Toxicology was sent to the Center for Human Toxicology at the University of Utah on the 28th of November after notification to the Defense on 22 November. Number six, this was a good faith attempt by the Government to send the sample to an independent lab for the retest. Number seven, the Center for Human Toxicology was in fact at that time an independent labora-

> tory and not under contract to the United States Air Force. Number eight, there is no reasonable belief that another retest would result in any evidence favorable to the Defense and the motion is therefore denied. (R. 72, 73).

Certain appellate exhibits in this case memorialize a collateral pretrial dispute between the government and the defense regarding the sending of urine to the University of Utah for testing. Appellate Exhibits XXII, XXIII, XXIV. The government letter dated 21 December 1983, Appellate Exhibit XXIII, asserts that military defense counsel was informed that "urine samples" in both this petitioner's case and the case of *United States v. Krueger, supra*, would be sent to the University of Utah for testing, that the samples would be consumed in the testing and that, upon being informed of these facts, the military defense counsel did not "object." The defense counsel's letters, Appellate Exhibits XXII and XXIV, assert that defense counsel never approved of this procedure and that prior to the government's sending urine from this petitioner to the University of Utah the defense requested on "numerous occasions" the opportunity to obtain a sample in order to have an independent test. As noted above, the "parent urine sample" was destroyed sometime between 27 September and 28 November 1983 by a person unknown but while such sample was under the exclusive control of the government.[1] (military judge's finding number four). The government sent the aliquot remaining from a prior test to the University of Utah for a retest. (military judge's finding number five). The Brooks laboratory where the "parent urine sample" was originally sent knew about the timely defense request for an independent retest; the laboratory had a duty to preserve the sample and did not do so. (military judge's findings numbers one, two, and four).

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[1] Appellate Exhibit XIX is a request from military defense counsel for access to the urine specimens for purposes of an independent urinalysis, and that request is coincidentally dated 27 September 1983.

REASONS FOR GRANTING THE WRIT

In affirming the Air Force Court of Military Review's decision in this petitioner's case, the United States Court of Military Appeals relied on *United States v. Kern*, 22 M.J. 49 (C.M.A. 1986) and this Honorable Court's opinion in *California v. Trombetta*, 467 U.S. 479 (1984). The disposition of this case and the cited authority therefor are identical to the case of *United States v. Krueger, supra*, presently on petition before this Honorable Court. The reasons for granting the writ in this petitioner's case and in the case of *United States v. Krueger, supra*, are thus the same even though counsel's articulation of those reasons may be somewhat different.

In the case of *United States v. Kern, supra*, cited as one basis for the decision in this case, the Court of Military Appeals held that when evidence is lost or destroyed the appellant must show that such evidence was of an apparently exculpatory nature before the government is barred from prosecuting and, moreover, that the appellant must also show that the lost or destroyed evidence was of such a nature that comparable evidence is unavailable. The short answer to the rule in *Kern* is that, where the only basis for conviction is a urinalysis, the urine sample is of a devastatingly exculpatory nature if an independent defense test contradicts the government's test. Moreover, since the urine was collected at a particular time on the basis of which an accused is charged with use of a drug during that time, there is not only no other comparable evidence, there is no other evidence at all that could possibly exculpate an accused.[2] The *Kern* case on its facts is inapposite as a basis to affirm this case since *Kern* was a larceny case where the government retained pictures of the

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[2] It might be argued that a military accused should attempt to preserve another sample of his urine whenever he provides urine for urinalysis. In theory this may appear to be a consideration until one considers the scope of the urinalysis program in the military, the locations throughout this country and overseas where military personnel are required to provide urine and where independent laboratories are not available and, finally, the expense to the average soldier, sailor and airman of having such immediate independent urine tests taken whenever the commander orders a "unit sweep" as was done in this case.

stolen property, the evidence of the pictures of the stolen property was obviously inculpatory not exculpatory, and the military judge in order to avoid the least unfairness to the accused reduced the value of the property from $2,647.72 as charged to "some value" (and hence reduced the maximum punishment that could be imposed). The general rule announced by the Court of Military Appeals in *Kern* as applied to urinalysis cases requires a disposition favorable to the defense since the evidence of the urine is the only exculpatory evidence that is or ever will be available to meet the particular charge of drug use where, as in this case, the urinalysis is the only basis for prosecution. These considerations are quite apart from the question of whether the defense should bear the impossible and illogical burden of having to prove that the urine is exculpatory without having the urine. It may be necessary to fashion a different rule for urinalysis cases and to bar prosecution where the urine has been lost or destroyed for any reason. As to this petitioner, it makes no difference if the parent urine sample were lost by inadvertence or by design. The test, contrary to the implication of the military judge's findings, should not be whether the government acted in good faith, but whether the petitioner has been deprived, through no fault of his own, of the only basis upon which he could present a factual defense.

The second basis asserted by the Court of Military Appeals to affirm this case is contained in this Honorable Court's opinion in *California v. Trombetta, supra*. It would appear that the lower court's opinion in *Kern* is a gloss of this Honorable Court's precedent in *Trombetta*. We submit that the rule in *Kern* or *Trombetta* cannot be applied to urinalysis cases where, notwithstanding a timely defense request, the urine sample is destroyed. Yet again the facts of this case are unlike *Trombetta* in several crucial respects. In this case the military judge in finding number two noted the duty of the laboratory to preserve the sample. (By sample, we of course refer to the "parent urine sample.") Thus, unlike *Trombetta*, the sample here was not destroyed in accordance with normal practice. We argue that there are significant differences between an on-the-scene "intoxilyzer" test and a urinalysis test

in that the intoxilyzer test may be less subject to tampering and malfunction. There is at least one case of record where there was tampering with urine samples. *United States v. Soler*, ACM 25277 (pending before the Air Force Court of Military Review). Moreover, a malfunction in the intoxilyzer can be explained from two sources, radio waves and if the suspect were dieting, both of which have at least the possibility of being established by an accused even apart from other evidence that might rebut the appearance of intoxication where the test is conducted "on-the-scene." In the case of the urinalysis, however, the possibilities of undetected human error are unlimited. Thus, again, it becomes evident that the rules that may apply in other cases will not apply in a urinalysis case where urinalysis is the only evidence of guilt, where the defense has made a timely request for a portion of the sample and where by inadvertence or otherwise, the defense has been deprived of access to that sample. We argue that, in these facts, this Honorable Court has the reluctant duty to fashion a *per se* rule that will ensure fairness to this petitioner and future persons similarly placed.

One final comment must be made on the practical policy aspects of a case such as this. It used to be an axiom of legal philosophy in the Anglo-American tradition that it would be better for ninety-nine guilty persons to go free than that one innocent person should be convicted. The urinalysis program as it is implemented in military practice where evidence of drug metabolites in a urine sample is alone sufficient to convict a military accused of a knowing and wrongful ingestion of such substances without other evidence may have set this legal axiom on its head. *United States v. Harper,* 22 M.J. 157 (C.M.A. 1986). An innocent military accused charged with drug use over a prior, usually substantial, period of time has no other way to defend himself or herself except by an exculpatory retest of the urine relied on by the government as the sole factual basis for prosecution. An accused can, of course, testify in denial and put the accused's character for truthfulness in evidence. Since, as in this case, an accused may be charged with drug abuse "in North America" during a

period of six weeks prior to the urine being taken, in this case from 25 June 1983 to 11 August 1983, such an effort will likely be futile and, moreover, places an accused of less than sterling character but who may otherwise be innocent of the charged offense at an impossible disadvantage. So long as military criminal practice permits an inference of wrongful use from evidence of the urinalysis alone, the only effective rebuttal must be to permit a defense examination and test of the sample. *United States v. Harper, supra;* MCM, 1984, part IV, paragraph 37*c*(5) Wrongfulness. Moreover, in this increasingly technical and sophisticated world, it is an inevitable certainty that something must go wrong at some time, somewhere. Murphy's law as applied to aircraft operations or to the urinalysis testing program makes it certain that human errors will occur and that the consequences will be profound. To place the force of criminal sanctions, which in the case of marijuana use in the military can include a dishonorable discharge and two years confinement, behind the urinalysis testing program will inevitably and logically result in the conviction of an innocent accused at some time, somewhere, in some case, if it hasn't happened already. This being a certainty, we submit that it is little enough to ask that the government be required to furnish a portion of the contested urine sample to the defense or forego prosecution altogether. Such a holding is required where urinalysis is the sole factual basis for conviction because (1) there is absolutely no other secondary evidence available, and (2) the test results alone in military practice as set out in the Manual for Courts-Martial are sufficient to cover all elements of the charged offense of drug abuse including knowledge and wrongfulness.

In addition to these considerations, the military due process standard set out in Article 46, U.C.M.J. requires that the laboratory reports of tests on petitioner's urine not be admitted against him. Article 46 requires that the prosecution and the defense have "equal opportunity to obtain witnesses and other evidence." There is thus no limitation based on a showing by the defense that the evidence is exculpatory, rather the military standard mandated by congress requires an equal opportunity that was denied in this case.

CONCLUSION

For the foregoing reasons, including the importance of the issue involved, the petition for certiorari should issue.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 51141/AF
CMR Dkt. No. S26386

UNITED STATES, APPELLEE

v.

JIMMY E. FROST, JR. (429-27-9257), APPELLANT

ORDER

On consideration of the granted issue (20 M.J. 365) in light of *United States v. Kern*, 22 M.J. 49 (C.M.A. 1986), and *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L.Ed.2d 413 (1984), it is, by the Court, this 17th day of July, 1986,

ORDERED:

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,*

/s/ JOHN A. CUTTS, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (LACEY)
Appellate Government Counsel (KISTLER)

*Judge SULLIVAN did not participate.

APPENDIX B

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM S26386

UNITED STATES

v.

AIRMAN JIMMY E. FROST, JR., FR 429-27-9257
UNITED STATES AIR FORCE

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12 Sep 1984

Sentence adjudged 15 March 1984 by SPCM convened at Holloman Air Force Base, New Mexico. Military Judge: David W. Wofford (sitting alone).

Approved sentence: Bad conduct discharge, confinement at hard labor for one (1) month, forfeiture of two hundred dollars ($200.00) per month for one (1) month and reduction to airman basic.

Appellate Counsel for the Accused: Colonel Leo L. Sergi, Major William H. Lamb and Major Francis T. Lacey, USAFR. Captain Rory L. Rank filed a brief on behalf of the accused. Appellate Counsel for the United States: Colonel Kenneth R. Rengert and Captain Kevin L. Daugherty.

Before

HODGSON, FORAY, and MURDOCK
Appellate Military Judges

DECISION

MURDOCK, Judge:

Appellant was found guilty, contrary to his pleas, of marijuana possession* by a judge alone special court-martial. He was sentenced to a bad conduct discharge, confinement at

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*(Explanatory note not part of original text.) The petitioner was convicted of *use*, not *possession*, of marijuana.

hard labor for one month, forfeiture of $200, and reduction to airman basic. Defense has asserted seven errors. We will discuss those warranting our attention.

I

The evidence in this case is based on a urinalysis of the accused which was positive for marijuana. The sample was obtained as part of a unit sweep of the transition flight to which the accused was assigned. The sample was tested and retested at the laboratory at Brooks Air Force Base, and retested at government request at the Center for Human Toxicology at the University of Utah (Center). At an appropriate time during the development of this case, defense counsel made a request for a portion of the urine sample so it could be tested at a laboratory of the accused's choosing. About this time the government conducted its first retest of the sample by submitting it for gas chromatograph mass spectrograph testing at Brooks Air Force Base. Lab personnel withdrew a small quantity of the total sample and took it to the proper lab for this test. Sometime before the remainder of that small portion was returned for safekeeping, all of the "parent" sample was inadvertently destroyed. This left a total of less than five milliliters available for further testing. Part of this remainder was sent to the Center for retesting. Another part was sent to the laboratory which the accused had selected in Albuquerque, New Mexico. The director of the Albuquerque lab notified defense counsel that only 30 to 40 microliters of urine had been received and that was an insufficient quantity to perform the desired tests.

The appellant now asserts that the results of the urine tests should have been suppressed because the defense was not able to perform an independent test of the urine sample. The defense counsel relies on the reasoning in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and several cases including *Banks v. Federal Aviation Authority*, 687 F.2d 92 (5th Cir. 1982).[1] In *Banks* the court

[1] *Hilliard v. Spalding*, 719 F2d 1443 (9th Cir. 1983); *People v. Gomez*, 596 P2d 1192 (Colo. 1979); *State v. Lovato*, 94 N.M. 780, 617 P2d 169 (Ct. App. 1980).

held that it violated the due process rights of two air traffic controllers to be fired for drug use based on single urine tests that the controllers had been unable to retest. The United States Supreme Court recently struggled with "what might loosely be called the area of constitutionally guaranteed access to evidence" in *California v. Trombetta*, ____ U.S. ____, 104 S.Ct. 2528 ____ L.Ed.2d ____ (1984). *Trombetta* involved breath tests for alcohol. The Court held that the item of evidence to be introduced and dealt with at court was the test result, not the breath sample. They held that the rights of the accused are adequately protected when there is a chance to attack the reliability of the test procedure and to cross-examine testing personnel. In the present case both of these opportunities were available, and personnel from both Brooks Air Force Base and the Center were examined and cross-examined extensively. This adequately protected the accused's rights and we find no error in admitting the test results.

The defense also objected to admitting the results of the lab test because they claimed the chain of custody had been broken. They contend that about four milliliters of urine left the Brooks lab and the director of the Center testified that they received about one milliliter for testing. At trial it was established that the four milliliter amount was a "scientific estimation" by the Brooks lab officer of how much urine he returned to safekeeping after the retest. (He estimated because the container was not graduated below five milliliters.) Later, as mentioned above, part of this remainder was sent to the Center and another small portion was sent to Albuquerque. It should be evident that all of a laboratory sample does not need to be shipped everywhere in order to keep the chain of custody intact. What is required is that "the court . . . be satisfied that in reasonable probability the article had not changed in important respects." *United States v. Courts*, 9 M.J. 285 (C.M.A. 1980). The trial court was satisfied that the chain of custody had not been broken. We see no reason to disagree.

II

The specification in this case alleges that the accused "did, at some place in North America, from on or about 25 June 1983 to on or about 11 August 1983 wrongfully use marijuana." Defense objected, at trial and on appeal, to this specification asserting that it was overbroad. Further, they assert that the government failed to establish jurisdiction because they did not prove that the accused had exhibited any psychological effects of the alleged drug use. Trial counsel explained the words "North America" were used to include drug use in Mexico because Holloman Air Force Base is about 75 miles from the border and "Air Force personnel frequently visit it on non-duty days."

National borders do not limit the operation of the Uniform Code of Military Justice. U.C.M.J., Art. 5, 10 U.S.C. 805; *see also United States v. Newvine,* 48 C.M.R. 188 (A.F.C.M.R. 1974). It is well established that almost any drug use by a servicemember is service connected. *O'Callahan v. Parker,* 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed. 2d 291 (1969); *Relford v. Commandant,* 401 U.S. 355, 91 S.Ct. 649, 28 L.Ed. 2d 102 (1971); *United States v. Trottier,* 9 M.J. 337 (C.M.A. 1980); *Murray v. Haldeman,* 16 M.J. 74 (C.M.A. 1983). In *Haldeman,* the Court of Military Appeals held that court-martial jurisdiction exists over servicemembers when they enter a military base "subject to any physiological *or* psychological effects of the drug." (emphasis added) In the present case the test was given on base and the results were positive for marijuana. That is sufficient physiological effect to establish jurisdiction.[2]

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[2] Good pleading practice should result in precisely drawn specifications. Unfortunately, some offenses by their nature make it difficult to limit the location of the offense to a small area. For example, it is permissible to charge absence without leave by alleging absence from the Air Force. *United States v. Brown,* 24 C.M.R. 585 (A.F.C.M.R. 1957) Drugs, because they are frequently used secretly and they can be used almost anywhere, would seem to require a certain latitude in alleging the location of their illegal use. Although we find the specification in this case to be legally correct, we urge restraint and discourage the use of such "shot gun" pleading.

III

Finally, defense asserted that the military judge erred by not allowing day for day credit for "illegal restriction" based on the time the accused was restricted to the base while he was assigned to the base transition flight.[3] We disagree.

Because of the accused's poor military record, which included two Article 15 punishments, his immediate commander decided to discharge him administratively. The accused was transferred to the base transition flight on 7 June 1983 and an administrative discharge action was initiated the next day. For some unexplained reason, the accused's commander restricted him to the base on 2 August 1983. No evidence was introduced to connect this restriction to the current charges. In fact, the restriction began nine days before the unit sweep was conducted and 21 days before the test results were known. The court properly held that this restriction was not related to the court martial charges and should not be considered for sentence credit.

The remaining assertions of error are without merit. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

HODGSON, Chief Judge and FORAY, Senior Judge, concur.

OFFICIAL

CHARLES L. WILLE
Captain, USAF
Chief Commissioner

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[3] This "unit" is part of the Combat Support Group and apparently acts as a holding area for servicemembers from all base units who are awaiting administrative discharge.

The loose practices revealed by this case should serve as a caution. The appellant's commander took steps to discharge him administratively in early June. One such step was to transfer him to the transition flight on 8 June 1983. He was still there awaiting discharge when the test results became known 77 days later. Whatever their utility, transition units may subject commanders to criticism when their existence encourages commanders to ignore their responsibilities by allowing airmen who should be discharged expeditiously to languish in a transition unit.

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